IN THE

Supreme Court of the United States

October Term, 1976

No. _____ 76-1540

JOSEPH H. HAVENER, Superintendent
Southern Ohio Correctional Facility,
Petitioner,

vs.

WALTER WEBB, JR.,
Respondent.

TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Court of Appeals of Summit County, Ohio, Case No. 7355, is unreported. (Appendix page 17). The opinion of the Ohio Supreme Court, Case No. 74-836, is unreported. (Appendix page 26). The opinion of the United States District Court For The Northern District Of Ohio, Eastern Division, Case No. C75-67A, is unreported. (Appendix page 28). The opinion of the United States Court Of Appeals For The Sixth Circuit, Case No. 75-2374, and a subsequent denial of rehearing, are as yet unreported. (Appendix

pages 36 and 51). The concurring and dissenting opinions of the Court of Appeals For The Sixth Circuit are located at Appendix pages 47 and 49.

JURISDICTIONAL BASIS

The decision of the United States Court of Appeals For The Sixth Circuit was entered February 18, 1977. (Appendix page 36). A petition for rehearing and suggestion of rehearing en banc was denied March 25, 1977. (Appendix page 51). Jurisdiction is conferred by 28 U.S.C. §1254(1).

QUESTION PRESENTED

WHETHER THE DECISION OF THE COURT BELOW HONORS THE SUBSTANCE OF *NEIL V. BIGGERS*, 409 U.S. 188 (1972) AND CONSTITUTES A MISAPPLICATION OF THE CRITERIA FOR JUDGING THE CONSTITUTIONAL ADMISSIBILITY OF BOTH IN COURT AND OUT OF COURT IDENTIFICATION EVIDENCE

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent, Walter Webb, Jr., hereinafter Webb, was convicted of armed robbery in the Court of Common Pleas of Summit County, Ohio, Case No. CR 73 9 949. Prior to trial, Webb filed a motion to suppress certain identification evidence, which was denied. (Tr. 136-138). (Appendix page 14). Upon appeal, the decision of the trial court concerning identification evidence was affirmed, respectively on July 3 and November 15, 1974, by the Court of Appeals of Summit County, Ohio, and the Ohio Supreme Court. (Appendix pages 17 and 26).

On February 2, 1975, Webb filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2241 with the United States District Court For The Northern District Of Ohio, Eastern Division, alleging as one contention, the identification question. On June 30, 1975, upon an agreed record, and after oral argument, the district court denied the writ. (Appendix page 28). Upon appeal to the United States Court of Appeals For The Sixth Circuit, that court, by 2-1 decision, reversed the denial of the writ of habeas corpus on the identification question. (Appendix page 36). Petitioner Havener's application for rehearing and suggestion of rehearing en banc was denied. (Appendix page 51). The mandate of the Court of Appeals has been stayed pending the application for certiorari.

STATEMENT OF FACTS

While useful as an overall model, the statement of facts set forth in the opinion of the Court of Appeals, appendix page 37, is unacceptable to petitioner.

The evidence at trial reveals that at approximately 6:00 A.M. on August 16, 1973, a 1967 light blue

Chevrolet with 20 day liscense tags stopped for gasoline at a service station owned by Howard Baker in Cuyahoga Falls, Ohio. In the car was a black man and a white woman with red hair, the woman being asleep in the back seat of the car. The man went into the station, ostensibly for the purpose of using the telephone, purchased a cup of coffee from the vending machine, exchanged a few words with Mr. Baker concerning the failure of the vending machine to deliver a full cup of coffee, inquired as to nearby room accomodations, bought $2.00 worth of gas and drove off. About ½ hour later, two black males approached Mr. Baker, who was then servicing a customer's car outside the station, and asked him where the restroom was located. A few minutes later, after Mr. Baker had gone inside, the men reappeared and Mr. Baker met them in the doorway. The men announced their purpose and pushed Mr. Baker back into the station. At gunpoint Mr. Baker gave the men the money which was in his pocket. Then Mr. Baker and Franklin Leach, a customer who was in the station at the time, were forced to lie down in a back room. When the men demanded all his money, Mr. Baker started to give them his coin changer. He was then hit on the side of the head, after which he gave his wallet to the robbers. Mr. Leach was kicked in the chin for failing to keep his head down as ordered. Mr. Baker and Mr. Leach waited for a few minutes on the floor after the men had left. Mr. Baker then called the police.

When the police arrived Mr. Baker and Mr. Leach provided descriptions of their assailants. Mr. Baker described one man as about 5′8″ to 6′, 180 to 200 pounds, with a squint in his left eye. The second man was described as about 6′ tall, over 200 pounds, with

long sideburns. (Tr. 55, 324-325). Mr. Leach described the first man as 5′10″, 200 pounds, black hair, processed, left eye with a squint, dark complexion. The other man was described as 6′, over 200 pounds, black hair, medium complexion. (Tr. 57, 324-325). Both Mr. Baker and Mr. Leach also gave a description of the clothing worn by the robbers.

According to the original police report taken by officer Boxler, who did not testify at trial, neither Mr. Baker or Mr. Leach mentioned a mustache in their description. (Tr. 58, 324-325). This was confirmed by Detectives Harris and Goodwell who interviewed Mr. Baker and Mr. Leach immediately after the crime had been committed, but after the initial police report. Detective Harris testified that neither Mr. Baker or Mr. Leach had told him about a mustache. (Tr. 324-325, 339). On the other hand Mr. Baker testified that he had told police about a mustache, facial hair, and/or hair around the man's mouth. (Tr. 108, 172-173, 195-197). Mr. Leach, while sure of his recollection that one of the robbers had a mustache, and believing that he did tell the police, was unable to recall whether his description included a mustache. (Tr. 118, 245-246, 250-252, 261). It was uncontroverted that Webb had a mustache. (Tr. 339).

Mr. Baker also told police about the earlier visit to his station by the couple in the blue Chevrolet. Mr. Baker testified at trial that, while the man who appeared earlier had asked to use the phone, he did not see him use it, (Tr. 165-166), and that he had not observed the man at 6:00 A.M. very closely. (Tr. 97-98, 165, 180-181). Mr. Baker testified that the man who appeared at 6:00 A.M. was not one of his assailants. (Tr. 181-182, 206-207, 209, 211, 213).

Early on the morning of August 17, 1973, one day after the robbery, Officer Bailes, who was on general traffic duty, saw the light blue Chevrolet described by Mr. Baker.[1] Officer Bailes stopped the vehicle, and discovered that the 20 day liscense was expired, whereupon he took the occupants of the car, James Lenzy, Richard Bentley, and Wanda Burt, Bentley's girlfriend, to the police station. James Lenzy and Richard Bentley were similar in appearance to the descriptions given by Mr. Baker and Mr. Leach. Lenzy being the shorter of the two and with a squint in his left eye. Richard Bentley resembled Webb. (Tr. 129-130).

Mr. Baker and Mr. Leach were called by police and asked to come to the station, which they did arriving separately about ½ hour apart. After Bentley agreed to participate in a show up, he was seen by Mr. Baker and Mr. Leach, neither of whom identified him as one of the robbers. (Tr. 232-233, 317, 329). Lenzy refused to participate in a show up but was seen by Mr. Baker and Mr. Leach as he was using a telephone. At that point identification was made of Lenzy as the man with the squinty eye. (Tr. 174, 234, 329). While it appears clear that Bentley was rejected prior to the identification of Webb, Mr. Baker and Mr. Leach were inconsistent as to whether Lenzy was identified after Webb or before. Mr. Baker testified that it was after, (Tr. 174); Mr. Leach testified it was before (Tr. 234, 244).

In the interim, Wanda Burt had told police that she, Lenzy, Bentley, Webb, and Webb's codefendant at trial, Cindy Johnson, had come to Akron from Canton, that

[1] Not Officer Goodwell as stated in the Court of Appeals opinion, appendix page 38. (Tr. 310).

Webb and Johnson were at a Brown Derby Motel[2], that Webb was wanted in Canton for not appearing at trial on another charge, and that apparently, Webb was somehow involved in the robbery under investigation. (Tr. 68, 318).[3] After confirming the outstanding warrant, police went and arrested Webb. Cindy Johnson, a white woman with red hair and the owner of the blue Chevrolet in which Bentley, Lenzy, and Wanda Burt, were riding, was not arrested at that time, but was brought to the police station at her request.

When the police left to arrest Webb, Mr. Baker and Mr. Leach were asked to remain while police went to pick up another suspect. When the police returned, Mr. Baker and Mr. Leach were sitting in an open area in the detective bureau adjacent to a hallway leading to the interrogation rooms. Webb was brought down the hallway in handcuffs and in the presence of officers and placed in an interrogation room. Nothing was said at that point in time between detectives and Mr. Baker and Mr. Leach.

When Webb was brought in, Mr. Baker immediately recognized him and nodded his head at the detectives. (Tr. 105, 201, 336-337). It is unclear as to whether Mr. Leach also nodded. After Webb was placed in an interrogation room, the detectives conversed with Mr. Baker and Mr. Leach, both identifying Webb, although it appears Mr. Baker spoke first. (Tr. 105, 201, 336-337, 343). It does not appear that Mr. Baker and Mr. Leach conferred prior to identifying Webb.

At trial, both Mr. Baker and Mr. Leach identified Webb and testified as to the out of court identification at the police station. Mr. Baker also testified as to his

[2] Mr. Baker had referred the man who appeared at 6:00 A.M. to a local Brown Derby motel.

[3] Wanda Burt was not available to testify at trial.

identification of Webb at a preliminary hearing. Mr. Leach was not present at the preliminary hearing. Both testified that they were absolutely positive in their identification and that it was based upon the events on the day of the robbery. (Tr. 96, 105-107, 170, 176, 227, 234-235, 264).

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

Petitioner has undertaken a lengthy review of the facts of the case, not merely to challenge the factual determination of the Court of Appeals, but to place such decision in perspective. In his dissent, Judge Celebrezze noted:

> Although the majority appears to favor a strict exclusionary rule turning upon the extent to which resort to impermissible identification procedures was compelled by necessity, it honors these precedents by continuing to adhere to the standard of review suggested in *Neil v. Biggers*, 409 U.S. 188 (1972). (Appendix page 49).

See *Brathwaite v. Manson*, 527 F.2d 363 (2nd Cir. 1975), *cert. granted*, — U.S. — (1976). Havener would suggest however that, while honored in language, the criteria of *Neil v. Biggers*, *supra*, were misapplied in substance. The Court of Appeals opinion, placed in the context of the record, exaggerates the factors of suggestiveness and minimizes those indicia of reliability found persuasive by the state courts and the initial federal court.

In *Neil v. Biggers*, *supra*, the Court made clear that it is "the likelihood of misidentification which violates a defendant's right to due process." Suggestiveness is of course disapproved because "it increases the likelihood of misidentification," but even assuming suggestiveness, the test is whether the identification is reliable:

> We turn to the central question whether under the 'totality of the circumstances,' the identification was reliable *even though the confrontation procedure was suggestive*. 409 U.S. at 199. (emphasis added)

In *Neil*, *supra*, the Court set forth a 5 part test for determining reliability:

1. The opportunity of the witness to view the criminal at the time of the crime
2. the witness' degree of attention
3. the accuracy of the witness' prior description of the criminal
4. the level of certainty demonstrated by the witness at the confrontation
5. the length of time between the crime and the confrontation.

All factors being considered, the record shows the error of the Court of Appeals.

With respect to opportunity of view, the Court of Appeals stated:

> The witnesses in this case, by their own testimony, could not have viewed the robbers for more than 'a couple of minutes.' For much of that time, the witnesses were on the floor, and for all but a few seconds were at gunpoint. (Appendix page 45).

Mr. Baker testified however, that the robbery took place after turning daylight, (Tr. 164, 167), that the robbery itself took about 5 minutes, which seemed longer, (Tr. 104, 168), that he had a clear look at the robbers when he initially handed them the money at gunpoint and when he was backed into the back room, and that even from the floor he was able to observe

them. (Tr. 167, 189-190). Mr. Leach similarly testified that he had a good opportunity to see the robbers, not only when they crossed into the station and asked to use the restroom, (Tr. 230), but thereafter when the robbery started. Not only was Mr. Leach turned around by Webb when he started to go the wrong way, but Mr. Leach was looking up from the floor. (Tr. 120-121). It is significant that Mr. Leach was kicked for not keeping his head down. (Tr. 230).[4] The robbers wore no masks.

With respect to the witness' degree of attention, Mr. Baker testified that his station had been robbed on 3 prior occasions, and that he had specifically instructed his employees to observe the robbers so that they could testify in court. Mr. Baker further testified that he followed his own instructions and observed the men carefully. (Tr. 103, 108, 109, 168-169, 191). Mr. Leach similarly made an attempt to observe the robbers. (Tr. 120-121, 229-230). The Court of Appeals minimized this testimony with a brief comment, unable "to describe them in any detail."

With respect to accuracy of prior description, the accounts given by Mr. Baker and Mr. Leach were more than general and were well within the bounds of articulation, including approximate height, weight, hair color and style, complexion, and clothing. Based in part on these descriptions, police took into custody Lenzy, the man with the squinty eye, and Bentley, who

[4] On this point, the Court of Appeals noted a discrepancy between Mr. Baker who testified that Webb kicked Mr. Leach, and Mr. Leach who testified that Lenzy kicked him. This discrepancy may be explained in part by the fact that Mr. Leach was kicked immediately after Lenzy hit Mr. Baker over the head with a gun. (Tr. 171, 192, 229).

did in fact resemble Webb. Moreover, as to the question of a mustache, the Court of Appeals never mentions that Mr. Baker testified that he told police about it.

With respect to the level of certainty, such factor is positive in favor of admissibility. Mr. Baker and Mr. Leach both testified that they were positive and the jury apparently believed them. Moreover, this is credible in view of the fact that they rejected Bentley, parenthetically, in a show up, even though again Bentley resembled Webb.

On this point, the Court of Appeals noted Mr. Leach's testimony on the motion to suppress that he had only identified one suspect, Lenzy, on the morning after the robbery, and his testimony at trial that he had identified two persons, Webb and Lenzy. The Court of Appeals fails to note however Mr. Leach's testimony that he was confused as to the time frame involved in defense counsel's questions. (Tr. 236-237, 241, 249, 259, 263, 265). This matter was subject to extensive cross examination and placed before the jury.

With respect to the length of time between the crime and the confrontation, less than 30 hours, such time span pales in comparison to the time involved in *Neil v. Biggers, supra.*

To be sure, grant of a petition for writ of certiorari is rare in the circumstance where only the private interests of the parties will thereby be vindicated. Rule 19, Rules of the Supreme Court. The present case however offers more than the mere fact that, because of exclusion of both the out of court and in court identifications, retrial will be futile.

The state and federal courts are dependent upon this Court for guidance in their resolution of constitutional issues. While the Court has set forth the para-

meters, consistency of application and balancing of suggestiveness versus reliability remain to be achieved. *Stovall v. Denno*, 388 U.S. 293 (1967); *Simmons v. United States*, 390 U.S. 377 (1968); *Coleman v. Alabama*, 399 U.S. 1 (1970); *Foster v. California*, 394 U.S. 440 (1969); *Neil v. Biggers, supra*. The present case is a proper vehicle and example. Despite no showing that the state courts and the initial federal court did not apply the correct constitutional guidelines, three separate opinions were issued on a matter which previously had uniform resolution.

As indicated by the concurring and dissenting opinions in this case, the question of suggestiveness in identification procedures has given rise to much controversy and inconsistency of application. A comparison of the present case to other reported decisions of the Court of Appeals, citing, *Neil v. Biggers, supra*, is informative. *United States v. Ayendes*, 541 F.2d 601 (6th Cir. 1976); *United States v. Bridgefourth*, 538 F.2d 1251 (6th Cir. 1976); *Hayes v. Cowan*, 535 F.2d 351 (6th Cir. 1976); *United States v. Rowan*, 518 F.2d 685 (6th Cir. 1975); *United States v. Scott*, 518 F.2d 261 (6th Cir. 1975); *Heltzel v. Cowan*, 518 F.2d 851 (6th Cir.), *cert. denied*, 423 U.S. 999 (1975); *Holland v. Perini*, 512 F.2d 99 (6th Cir.), *cert. denied*, 423 U.S. 934 (1975); *United States v. Clark*, 499 F.2d 889 (6th Cir. 1974), *cert. denied*, 420 U.S. 910 (1975); *United States v. Caulton*, 498 F.2d 412 (6th Cir.), *cert. denied*, 419 U.S. 898 (1974); *Hastings v. Cardwell*, 480 F.2d 1202 (6th Cir. 1973), *cert. denied*, 415 U.S. 923 (1974); *Contra*, See: *United States v. Russell*, 532 F.2d 1063 (6th Cir. 1976); *Marshall v. Rose*, 499 F.2d 1163 (6th Cir. 1974). See also: *Hancock v. Tollett*, 447 F.2d 1323 (6th Cir. 1971); *United States ex rel Penachio v. Kropp*, 448 F.2d 110 (6th Cir. 1971); *Sewell v. Cardwell*, 454 F.2d 177 (6th Cir. 1972); *Johnson v. Salisbury*, 448 F.2d 374 (6th Cir. 1971), *cert. denied*, 405 U.S. 928 (1972). While certainly each case must be judged on its own facts, the "suggestiveness" herein, when matched with indicia of reliability, is no less comparable than other prior decisions in which affirmance was upheld.

Petitioner makes no attempt in this application to catalogue the innumerable decisions from other circuits, such being unnecessary to establish the need for further guidance in the application of *Neil v. Biggers, supra*. *United States ex rel Kirby v. Sturges*, 510 F.2d 397 (7th Cir.), *cert. denied*, 421 U.S. 1016 (1975), a case factually similar to the present one and decided differently, makes this point all too well. What is of concern to petitioner is that a once thought final and valid state court judgment is subject to chance. The Court of Appeals herein, in focusing on suggestiveness, to the exclusion of reliability, did not honor *Neil v. Biggers, supra*, in substance. Accordingly, its misapplication should be reversed.

CONCLUSION

The Court of Appeals opinion constitutes a misapplication of the criteria of *Neil v. Biggers, supra*. The petition for writ of certiorari should be granted and reversal entered.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was mailed to respondent Walter Webb, Jr., through the office of his counsel, Albert S. Rakas, Dana F. Castle, Margery B. Koosed, Appellate Review Office, School of Law, Akron University, Akron, Ohio, 44325, and Dennis J. Bartek, 73 East Mill Street, Akron, Ohio, 44325. I hereby certify that all persons required to be served have been so served.

LEO J. CONWAY
Assistant Attorney General

APPENDIX
RULING OF TRIAL COURT ON IDENTIFICATION

[p. 136]

STATE V. WEBB, No. CR 73 9 949
Court of Common Pleas, Summit County

The Court: Well, as to the first proposition dealing with the denial of right of Counsel, there is no question at all because the issue hasn't even been raised. There's been no showing or any evidence that I've heard that showed that he either requested or was denied Counsel, and there's probably — it's been cited in the Kirby vs. Illinois case that he would not be entitled to Counsel in that case anyhow.

As to whether it was an unduly suggestive confrontation there is more question presented than on the question of denial of Counsel, but again I think the matter is fairly clear. The whole concept under unduly confrontation is defined by the cases that the Supreme Court has ruled upon. They have tried to

exclude a single confrontation after an undue period of time has passed where the police are trying to suggest to a witness that this is the party who committed the crime and we are asking you to identify him. They don't have to use those words but that is the theory underlying it. [p. 137]

To hold that the police cannot have a victim in an offense view a possible suspect within a reasonable period of time after the commission of the offense would be practically to deny the police the right to investigate a crime, and I don't think any case law has held that yet. The whole idea is to stop abuses of the process.

Now I fail to see where Mr. Webb's rights have been unfairly and unduly violated here in that he has been subjected to a process in which a witness was either badgered or had it suggested to him or had the idea implanted in his mind or was presented with a confrontation in which he could only arrive at a result which the police desire.

I'd like to read to you the summary of facts in the Kirby vs. Illinois case, cited in 406 U.S. Reports at Page 682: Petitioner and a companion were stopped for interrogation. When each produced, in the course of demonstrating identification, items bearing the name "Shard", they were arrested and taken to the Police Station. There, the arresting officers learned of a robbery of one "Shard" two days before. That's two days.

The officers sent for Shard, who immediately identified petitioner and his companion as the [p. 138] robbers. At the time of the confrontation petitioner and his companion were not advised of the right to Counsel, nor did either ask for or receive legal assistance. Six weeks later, they were indicted and brought to

trial. At the trial, after a pre-trial motion to suppress his testimony had been overruled, Shard testified as to his previous identification of petitioner and his companion, and again identified them as the robbers. The Defendants were found guilty. Their appeal was upheld, and in the Kirby case the U.S. Supreme Court held that the judgment is affirmed, and they held that two days later was not an unreasonable time between the offense and the single confrontation between the victim and the suspects.

It appears to me that the facts of that case are certainly close enough to this case to warrant following the Kirby authority.

I will do so, and overrule the motion. You may have your exceptions.

**IN THE COURT OF APPEALS,
NINTH JUDICIAL DISTRICT.**

(January Term, 1974.)

C.A. No. 7355.

**APPEAL FROM JUDGMENT ENTERED
IN THE COURT OF COMMON PLEAS
OF SUMMIT COUNTY, CASE NO.
73-9-949.**

STATE OF OHIO,
Plaintiff-Appellee,

vs.

WALTER WEBB, JR.,
Defendant-Appellant.

DECISION AND JOURNAL ENTRY

Dated July 3, 1974.

This cause came on to be heard April 23, 1974, upon the record in the trial court, including the Transcript of Proceedings; and the briefs. It was argued by counsel for the parties and submitted to the court. Each assignment of error was reviewed by the court and, upon review, the following disposition made:

COLE, J.

The defendant (appellant), Walter Webb, Jr., was indicted, tried by jury, and found guilty of armed robbery (R.C. 2901.13). Judgment was entered on the verdict and, from that judgment, an appeal has been lodged in this court.

I. The first assignment of error contends that the trial court erred in overruling a motion to suppress

certain evidence, to-wit: a gun seized at the time the defendant was arrested.

Under the exclusionary rule adopted by the Supreme Court of the United States, "evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure." U.S. v. Calandra, 94 S. Ct. 613 (1974), p. 619.

Normally there is required the appropriate issuance of a warrant as a predicate for a lawful search. However, exceptions exist.

> "It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment. This general exception has historically been formulated into two distinct propositions. The first is that a search may be made of the *person* of the arrestee by virtue of the lawful arrest. The second is that a search may be made of the area within the control of the arrestee.
>
> "Examination of this court's decisions in the area show that these two propositions have been treated quite differently. The validity of the search of a person incident to a lawful arrest has been regarded as settled from its first enunciation, and has remained virtually unchallenged until the present case. The validity of the second proposition, while likewise conceded in principle, has been subject to differing interpretations as to the extent of the area which may be searched."

U. S. v. Robinson, 94 S. Ct. 467 (1973), p. 471.

See, also: U. S. v. Edwards, 94 S. Ct. 1234 (1974) which reiterates this principle and states, at page 1237, that warrentless search conducted as incident to custodial arrests has "traditionally been justified by the reasonableness of searching for weapons, instruments

of escape and evidence of crime when a person is taken into official custody and lawfully detained."

In the case of Chimel v. California, 395 U.S. 752; 89 S. Ct. 2034 (1969), the search of what amounted to a whole house, based on the custodial arrest of an occupant, was held to be unreasonable. In arriving at this decision, however, the opinion states:

> "* * * When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control' — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."

Thus, the broad question is the reasonableness of the search as related to the arrest situation. The narrow question, in the present case, is whether the gun was located in an area within the immediate control of the arrested person construing that phrase to mean the area from within which he might gain possession of it.

The factual situation here involved was presented to the trial court at the hearing on the motion to sup-

press. It may be reasonably inferred that the arresting officers had been informed that the defendant was wanted by the Canton police for leaving a court in Canton (p. 28), and Canton had a warrant for his arrest. The arresting officers had been told by a witness to be careful, that the defendant was a narcotic user and "if he's high he'll kill you and he does have a gun." They had further been told by the Canton police that the defendant was dangerous. Defendant was located at a motel. When the police arrived and knocked on the door the defendant opened it. He had no clothes on. One group of police immediately sought to arrest and handcuff him (R. 9). The other two policemen moved to the bed where a woman was lying, also without clothing. There is some discrepancy and dispute as to how far Webb was from the bed but, on page 9, one officer testifies that he was "about right next to the bed. The woman was told to get off the bed, the mattress was pulled up, and between the mattress and the springs was a revolver and some bullets for it. The police, because of the warning, were expressly looking for a gun.

The arrest here is proper and was made with reasonable cause. The sole question concerns the reasonableness of the area involved in the search. It would appear the police had reasonable grounds to know that the defendant had a gun; that he was potentially dangerous. Obviously, the gun was not on his person. The woman also was obviously unarmed. However, the bed area was within her potential control and possibly in the control of the defendant if he tried to exert force. The action of the police in searching that area for a gun reported to exist for their own safety was reasonable under the circumstances, since either the defendant or his woman companion acting on his behalf might have gained possession of a weapon from that area.

The assignment of error is not well taken.

II. In his second assignment of error, the appellant contends that the trial court erred in denying the appellant motion to suppress a pre-trial identification in that the circumstances were unduly suggestive and conclusive to error.

There is no contention that appellant at the time of the pre-trial identification, which occurred prior to the initiation of charges for this offense, was entitled to counsel. Such being the case, the sole ground for the suppressing of a pre-trial identification is that the procedures used violated the appellant's right to due process. Stovall v. Denno (1967), 87 S. Ct. 1967, 388 U.S. 293.

In State v. Sheardon, 31 Ohio St. 2d 20 (1972), the second paragraph of the syllabus reads as follows:

> "The due process clause of the Fifth and Fourteenth Amendments forbids any pre- or post-indictment lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification."

In the present case, it appears that the two identifying witnesses were asked to remain at the police station to view a "suspect." Somewhat later the appellant, who had been arrested on another charge, was brought into the detective bureau room where the witnesses were seated on the way to placing him in an interrogation room. The witnesses seeing him either at that time or slightly later identified him to the police as one of the two men who had held them up at the filling station operated by one of the witnesses.

The issue is that stated in Stovall v. Denno, supra (p. 1972):

> "* * * whether petitioner * * * is entitled to relief on his claim that in any event the confrontation conducted in this case was so unnecessarily suggestive and conductive to irreparable mistaken identification that he was denied due process of law."

That case, as the one now considered, involved a one to one show-up for identification and found it did not violate the due process standards. The court said:

> "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned. However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it * * *."

In that case, a death bed situation, in which a critically wounded witness was in the hospital to which the accused was brought, gave rise to the necessity of the one to one viewing. No such situation here exists. However, the same rule as to the totality of circumstances must be applied to determine if the viewing process was "unnecessarily suggestive and conducive to irreparable mistaken identification." See, also: Kirby v. Illinois, 92 S. Ct. 1877 (1972).

Obviously, a one to one confrontation is, of itself, not suggestive of any thing. A chance meeting on a street may lead to recognition not because of the situation but simply because of the similarity of appearance to a pre-existing mental image. The element of suggestion enters only (and the potential unfairness) when the meeting is in some way officially conducted. The conduct of the police, the way the confrontation occurs, the requirement for immediate action, the original opportunity of the witness to form a mental image, the lack of deviation or other mistaken identification—

all these factors enter into the totality of mutual and interrelating circumstances which must be considered.

Here the evidence indicates no overt effort by the police to implant a concept of identification. The witnesses were asked to wait to see a "suspect," (R. 343) and this word, in its common usage, implies no more than a possibility of involvement in the criminal act. There was moreover no specific identification by the police of the appellant as the "suspect" although the presence of the same officer made an inference as to this conclusion likely (R. 326). He was merely brought into the room without comment and without specifically being exhibited to the witnesses, and the identification was volunteered by the witnesses. Their prior verbal identification was reasonably close to the actual appearance of appellant (R. 327) so far as the record reveals, except for a question as to whether or not a moustache had been mentioned to the officer taking the description. There is no evidence either witness ever erroneously identified anyone else as the participant in the robbery. The witnesses (R. 174, 211, 232) had previously rejected another man as one of the robbers. (R. 312, 318, 329). Both witnesses had ample opportunity to form a clear mental image of their assailants (R. 189 et seq.) as the robbery took place in daylight, took five minutes or more, the witnesses faced the robbers and neither wore any mask or other facial disguise or concealment. Moreover, at the trial both witnesses gave definite in-court identifications.

Taking all of these factors, and their mutual interrelation, it appears that there is nothing to indicate that either witness was subjected to or responded to official suggestions in the pretrial identification.

The evidence, at the pretrial hearing on the motion to suppress, was not developed as far as that on trial and, although it would appear appropriate objections

were not made at trial, the evidence at trial is used as the criterion in determining this issue.

The assignment of error is not well taken.

III. The appellant assigns as error that the verdict is against the manifest weight of the evidence. The basic question here is not whether a crime was committed but who committed the crime. There is positive in-court identification by two witnesses which, if believed, is sufficient to answer this question beyond a reasonable doubt. The credibility of these witnesses was a matter for determination by the jury.

IV. It is assigned as error that the prosecutor made certain improper remarks prejudicial to the appellant.

No objection was made to the remarks at page 381 and at page 412 and objection is therefore waived. Moreover, there is no objection to references to new clothes. Objection to reference to a changed appearance of the defendant (R. 408) was sustained. Objection was made to the reference by the prosecutor to "trickery" (R. 410) and it was sustained by the trial court and the jury was instructed to disregard the reference.

There are no other objections to the prosecutor's closing statement on which error is assigned.

The assignment of error is not well taken.

Finding no error prejudicial to any substantial right of the appellant, the judgment is affirmed.

Judgment affirmed.

The court finds that there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court, directing the Court of Common Pleas to carry this judgment into execution. A certified copy of this

journal entry shall constitute the mandate, pursuant to Rule 27 of the Rules of Appellate Procedure.

Ten (10) days from the date hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals, at which time the period for review shall begin to run. Appellate Rule 22(E).

Exceptions.

OSCAR HUNSICKER (sgd)
Presiding Judge—
for the Court.

HUNSICKER, P. J., and
DOYLE, J. concur.

(Hunsicker, J., and Doyle, J., retired and assigned to active duty under authority of Section 6. (C), Article IV, Constitution. Cole, J., of the Third Appellate District sitting by assignment in the Ninth Appellate District, under authority of Section 5.(A)(3), Section 14, Constitution.

Judge Oscar Hunsicker presiding.

APPEARANCES:

Stephan M. Gabalac, Prosecuting Attorney, Frederic L. Zuch, Assistant Prosecuting Attorney, Summit County, City-County Safety Building, Akron, Ohio 43208—for Plaintiff-Appellee.

Dennis J. Bartek, Attorney at Law, 380 E. Exchange Street, Akron, Ohio 44304—For Defendant-Appellant.

THE SUPREME COURT OF THE STATE OF OHIO

1974 Term

To wit: November 15, 1974

No. 74-836

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR SUMMIT COUNTY

STATE OF OHIO,

Appellee,

vs.

WALTER WEBB, JR.,

Appellant.

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00 paid by Affidavit of Poverty.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this .... day of ..... 19...

..... Clerk

..... Deputy

THE SUPREME COURT OF OHIO

1974 Term

To wit: November 15, 1974

No. 74-836

APPEAL FROM THE COURT OF APPEALS FOR SUMMIT COUNTY

STATE OF OHIO,

Appellee,

vs.

WALTER WEBB, JR.

Appellant.

This cause, here on appeal as of right from the Court of Appeals for Summit County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Summit County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this .... day of ..... 19...

..... Clerk

..... Deputy

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION
Civil Action C 75-67 A

JUDGMENT ENTRY
Filed June 30, 1975

WALTER WEBB, JR.
Petitioner.

vs.

JOSEPH H. HAVENER, Superintendent,
Southern Ohio Correctional Facility,
Defendant.

The Court having entered its opinion,

It Is Ordered, Adjudged and Decreed that the Application for Writ of Habeas Corpus is hereby denied and the action is dismissed.

LEROY J. CONTIE, JR.
U. S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION
Filed June 30, 1975
Civil Action C 75-67 A

ORDER

WALTER WEBB, JR.
Petitioner.

vs.

JOSEPH H. HAVENER, Superintendent,
Southern Ohio Correctional Facility,
Respondent.

Petitioner in the above captioned cause of action has filed an application seeking the issuance of an Order by this Court granting him habeas corpus relief. On Friday, May 16, 1975, this Court held a hearing to determine petitioner's claim. At that time the attorneys for the parties involved agreed and stipulated that the trial record of the Common Pleas Court of Summit County, Ohio be received into evidence. The attorneys thereafter waived the introduction of other evidence and proceeded to legal arguments.

The petitioner asserts two grounds for relief. First, Petitioner asserts that he was denied his right to due process of law in violation of Article I, §14 of the Ohio Constitution and the Fourth Amendment of the United States Constitution as applied to the states by the Fourteenth Amendment of the United States Constitution when evidence of a gun which was obtained by means of a warrantless exploratory search, made inci-

dent to an arrest, of a mattress which was not within the immediate control of the arrestee or any other person, was introduced at trial notwithstanding the petitioner's objection. Secondly, petitioner asserts that he was denied his right to due process of law in violation of the Fourteenth Amendment of the United States Constitution when despite petitioner's objection evidence of a show-up identification was introduced which had been procured by parading the petitioner past two victims of an armed robbery where petitioner was handcuffed and in the custody of a police officer who had previously directed the victims to remain in a specific location until a suspect could be brought in for their observation and that evidence obtained by this procedure was fatally suggestive and conducive to irreparable mistaken identification.

This Court first notes that the arguments presented to this Court have previously been presented to the state courts and that the Court of Common Pleas for Summit County dealt with and denied petitioner's motions to suppress at the time of trial on both specific issues. This Court therefore finds that a hearing wherein the presentation of evidence in regards to the claims of petitioner is received is not necessary in the instant case. See *Townsend* v. *Sain*, 372 U.S. 293, 83 S. Ct. 745, 9 L.Ed. 770 (1973).

The facts as agreed to between the parties are as follows: At approximately 6:00 a.m. on August 16, 1973, a 1967 light blue Chevrolet stopped at a Martin Oil Station located on North Main Street. Petitioner was driving said car and inquired as to where he could find a motel in the area. Sleeping in the back seat was a white woman companion of his. Later, at approximately 6:35 the above mentioned service station was

robbed by two black males. The next day two black males, James Lenzy and Richard Bently, were arrested and charged with armed robbery. When they were taken into custody they were driving a 1967 light blue Chevrolet which fit the description given by the station manager of the car he had observed approximately one-half hour before the armed robbery.

Later that day, August 17, 1973, petitioner Webb was arrested at the Brown Derby Motor Inn on a warrant based on an incident which had occurred in Stark County, Ohio. Information as to his location had been obtained while the two suspects of the armed robbery were being held in custody by the Akron Police Department. Wanda Burt who knew the two suspects in the armed robbery apparently accompanied the suspects to the police station and thereupon indicated to the police officers that petitioner was involved in a robbery and was located at the motor inn described above. Ms. Burt further indicated that she had had contact with the petitioner within the last 24 hours and that petitioner had a gun in his possession.

The authorities executed the arrest warrant from Stark County and upon their arrival at the motor inn secured the area, called from the room next door and indicated that they were there to arrest him and thereafter knocked on the door. Petitioner opened the door and offered no resistance. Petitioner had no clothing on at the time. He had with him in his room the woman who was with him in his car the previous day, who was also unclothed. Petitioner was handcuffed and the lady was directed to sit in a chair in a different part of the room. Thereafter, the officers proceeded to search the room and found a gun hidden underneath the mattress on the bed. Petitioner was taken to the

police station in handcuffs and upon the officers' taking him in to the police station, he was identified by the victims of the armed robbery who were sitting in a waiting room at the instruction of the police officers. The facts further indicate that the victims were able to observe the other two suspects in the armed robbery and a positive identification was made of only one, to wit: Lenzy.

The Court turns first to the petitioner's argument in regards to the illegal seizure of the weapon. The general law in the area of a warrantless search was stated by the Supreme Court in the case of *Chimel* v. *California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L.Ed. 2d 655 (1969). Therein, the Supreme Court quoting from Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed. 2d 889 stated:

> "[t]he scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissile."

However, the Supreme Court went on to quote from *United States* v. *Rabinowitz*, 339 U.S. at 83, 70 S. Ct. at 443, (dissenting opinion) and state that the reasonableness of a warrantless search depends upon the facts of the particular case:

> "'[t]he recurring questions of the reasonableness of searches' depends upon 'the facts and circumstances—the total atmosphere of the case' . . . "

The facts of the instant case are that the officers upon arresting the petitioner knew that he had within his possession a weapon. His girl friend was sitting on a chair several feet from the bed where the weapon was eventually found. The State of Ohio asserts that because petitioner was naked, it was necessary to unhandcuff him and allow him to dress. The State of

Ohio therefore concludes that it was reasonable for the officers to search for a known weapon within the room to insure their own safety.

Upon consideration of these facts, this Court cannot conclude that the search that was instituted was a violation of the petitioner's rights. Although there were four armed police in the room at the time the search was made, the search was not conducted for evidence, but rather for the safety of the officers. It is not unreasonable to assume that during the dressing process the petitioner would have been seated on the bed or been near enough to the bed to make an attempt to secure a weapon. As such, this Court finds that it was reasonable for the officers in the room to search that bed for said weapon.

The Court further notes that the weapon found, although admitted into evidence in the trial of the petitioner, was in no way connected with the robbery and that therefore even were the search unreasonable the error in admitting said weapon into evidence must be considered harmless.

Turning to petitioner's second argument, the Court finds that the case of *Kirby* v. *Illinois*, 406 U.S. 682, 92 S. Ct. 1877, 32 L.Ed. 2d 411 (1972), to be controlling. The Court therein stated that a one-on-one identification process was not a violation of the constitutional rights of a defendant. See also *Stovall* v. *Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L.Ed. 2d 1199 (1967). This Court notes that the Summit County Ninth District Court of Appeals in considering petitioner's identical claim stated:

> ". . . the conduct of the police, the way the confrontation occurs, the requirement for immediate action, the original opportunity of the witness to

form a mental image, the lack of deviation or other mistaken identification—all these factors enter into the totality of mutual and interrelating circumstances which must be considered.

"Here the evidence indicates no overt effort by the police to implant a concept of identification. The witnesses were asked to wait to see a 'suspect,' (R. 343) and this word, in its common usage, implies no more than a possibility of involvement in the criminal act. There was moreover no specific identification by the police of the appellant [petitioner herein] as the 'suspect' although the presence of the same officer made an inference as to this conclusion likely (R. 326). He was merely brought into the room without comment and without specifically being exhibited to the witnesses, and the indentification was volunteered by the witnesses. Their prior verbal identification was reasonably close to the actual appearance of appellant (R. 327) so far as the record reveals, except for a question as to whether or not a moustache had been mentioned to the officer taking the description. There is no evidence either witness ever erroneously identified anyone else as a participant in the robbery. The witnesses (R. 174, 211, 232) had previously rejected another man as one of the robbers. (R. 312, 318, 329). Both witnesses had ample opportunity to form a clear mental image of their assailants (R. 189 et seq.) as the robbery took place in daylight, took five minutes or more, the witnesses faced the robbers and neither wore any mask or other facial disguise or concealment. Moreover, at the trial both witnesses gave definite in court identifications.

"Taking all of these factors, and their mutual interrelation, it appears that there is nothing to indicate that either witness was subjected to or responded to official suggestions in the pre-trial identification."

In the case of *Kirby* v. *Illinois*, 406 U.S. 682, 92 S. Ct. 1877, 32 L.Ed. 2d 411 (1972), the court therein found the identification process in that case to be

proper under facts similar to those in the instant case. The facts of that case were that the defendant and a friend were picked up for possessing property which was that of a particular individual. The police called said individual, had him come to the police station and upon his arrival and immediately upon entering the room, individual identified the defendant and his friend as those who had robbed him. The Court found the identification to be proper.

Under the totality of the circumstances and considering the same factors as the Summit County Ninth District Court of Appeals, this Court finds that the identification process was not unduly prejudicial or suggestive so as to violate the constitutional rights of petitioner.

Therefore and for the reasons stated above, petitioner's application for Writ of Habeas Corpus is hereby denied. Case dismissed.

It is so ordered.

LEROY J. CONTIE, JR.
U. S. District Judge

No. 75-2374

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WALTER WEBB, JR.,
Plaintiff-Appellant,

vs.

JOSEPH H. HAVENER, Superintendent
of Southern Correctional Facility,
Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Ohio

Decided and Filed February 18, 1977.

Before: CELEBREZZE, MCCREE, and ENGEL, Circuit Judges.

MCCREE, Circuit Judge, delivered the opinion of the Court. ENGEL, Circuit Judge, (pp. 11-12) filed a separate concurring opinion. CELEBREZZE, Circuit Judge, (p. 13) filed a separate dissenting opinion.

MCCREE, Circuit Judge. This appeal from the dismissal of a petition for a writ of habeas corpus requires us to determine whether the admission of out-of-court identification of appellant violated his constitutional right to a fair trial.

Appellant attacks his state conviction of armed robbery on two constitutional grounds. First he contends that the out-of-court identification that two witnesses made of him was made under such suggestive circumstances that its admission into evidence denied him due

process of law. He also argues that a gun was illegally seized in a warrantless search and that its admission was a violation of his Fourth Amendment rights. Because we hold that evidence of the challenged identifications should not have been admitted at trial, we need not consider appellant's Fourth Amendment claims.[1]

The evidence offered at trial reveals that in the early morning of August 16, 1973, a black man and a white woman in a light blue Chevrolet automobile stopped for gasoline at a station owned by Howard Baker in Cuyahoga Falls, Ohio. The man went into the station, purchased a cup of coffee from the vending machine, exchanged a few words with Mr. Baker, returned to the car and drove off. About one-half hour later two black men approached Baker, who was then servicing a customer's car outside the station, and asked him where the restroom was. A few moments later, after Baker had gone inside, they reappeared and Baker met them in the doorway. Baker was forced back into the station at gunpoint and ordered to give over the money he had in his pockets. Then both Baker and Franklin Harry Leach, a customer who was in the station at the time, were forced to lie down in the back room. While they were still lying down the robbers left.

When the police arrived, Baker and Leach provided descriptions of their assailants in general terms. One man was described as about five feet eight inches to

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[1] Review by this court of the legality of this seizure and the permissibility of the introduction of irrelevant and highly prejudicial evidence obtained thereby is complicated by the recent decision in *Stone* v. *Powell*, —— U.S. —— (1976). We therefore express no views about this issue, which may not arise again in the event of retrial.

six feet tall, 180 to 200 pounds, with a squint in his left eye. The second man was described as about six feet tall, over 200 pounds, with long sideburns. Baker also mentioned the earlier visit to his station by the couple in the blue Chevrolet. Nevertheless, in his testimony, Baker stated that the man in the Chevrolet was not one of his assailants.

Early the next morning, Officer Goodwell, who was on general traffic duty, saw a blue Chevrolet of the general description mentioned by Baker. He stopped the vehicle and discovered that its temporary registration had expired. He thereupon took its occupants, James Lenzy, Richard Bentley, and Wanda Burt, to the police station.

Although the testimony about what happened at the police station is incomplete, and in some details contradictory, it reveals that Baker and Leach were asked to come to the station to try to identify Lenzy and Bentley as the men involved in the robbery the day before. Bentley agreed to participate in a show up, but neither Baker nor Leach identified him. Lenzy refused to participate in a show up, but was seen and recognized by Baker and Leach together as he was attempting to use a telephone.

Meanwhile, Wanda Burt had told police officers that the Canton police were looking for appellant, and that he and Cindy Johnson, his co-defendant at trial, could be found at a nearby motel.[2] After confirming that a warrant had issued in Canton for appellant's arrest, Akron police officers went to the motel to execute the

[2] Wanda Burt was not available to testify at trial. We do not know, therefore, exactly what information she gave about Webb. It appears that Webb had left Canton during a trial involving an unrelated crime.

warrant. Baker and Leach were asked to remain at the station while the police went to bring in another suspect.

Appellant and Johnson were in bed at the motel when the police arrived. Appellant was arrested and then both were taken to the police station. After arrival, appellant, still handcuffed, was escorted by police officers into a room where Baker and Leach were waiting. They identified him.

The Supreme Court has on many occasions disapproved of police practices that involve unnecessarily suggestive identifications. In *Wade* v. *Gilbert*, 388 U.S. 218 (1967), the Court, recognizing that "the annals of criminal law are rife with instances of mistaken identification," held that by recognizing the right of an arrested suspect to the assistance of counsel when he is compelled to participate in a lineup, this danger would be minimized. The Court established a clear rule that evidence of lineup identification of suspects who did not have the benefit of counsel at the lineup was inadmissible even without a showing of improper action by the police that created any likelihood of misidentification. However, even though the admission of improper out-of-court identification was forbidden, the Court held that an *in-court* identification by the same witness could be made if a basis for the identification independent of the improper lineup could be established.[3] This approach is consistent with the doctrine that permits the admission of evidence different from

[3] This distinction between pretrial and in-court identification was explicated in *Coleman* v. *Alabama*, 399 U.S. 1 (1970), when Justice Brennan wrote that an in-court identification could be based upon observations at the time of the crime and not at all induced by the conduct of the lineup.

but related to other evidence obtained by constitutionally impermissible means to be admitted if its proponent can show that it is not "fruit of the poisonous tree." *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

In *Stovall* v. *Denno*, 388 U.S. 293 (1967), a case argued and decided with *Wade*, although the Court held that the exclusionary rule announced in *Wade* should not be applied retroactively, nevertheless, it stated that a pre-*Wade* identification made during a one-on-one confrontation may be so unnecessarily suggestive and conducive to irreparable mistaken identification that its use at trial would amount to a denial of due process of law. Relying on the right to due process, instead of the right to counsel, the Court in its brief opinion did not elaborate upon the factors that would require a decision that due process had been denied. It recognized, however, that necessity can be a factor in determining identification procedures that may be used by the police. On the particular facts of *Stovall*, where the identifying witness was in grave condition in a hospital and there was no practical opportunity to employ a less suggestive method of identification than the one-on-one hospital room confrontation, the Court found no violation of due process.[4]

The Court again expressed its concern about mistaken identification in *Simmons* v. *United States*, 390 U.S. 377 (1968). In that case, the defendant challenged

[4] The Court applied *Stovall* in *Foster* v. *California*, 394 U.S. 440, 443 (1968), when it held that repeated confrontations between the witness and the defendant were so arranged by the police "as to make the resulting identification virtually inevitable."

in-court identification made by witnesses who had previously identified the defendant during claimed unnecessarily suggestive photographic displays. The Court held that each case involving "convictions based on eyewitness identification at trial following a pretrial identification by photograph" must be considered on its own facts, and that such convictions will be set aside "only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." 390 U.S. at 384. In *Simmons*, as in *Wade* and *Coleman*, the Court recognized that, despite an intervening impermissible identification, an eyewitness may retain a clear image of his assailant based upon observations at the time of the crime. This image may be so strong that in-court identification can be considered "independent" of, and not the product of, the impermissible procedure. This independent basis must be determined on the facts of each case.[5]

In *Neil v. Biggers*, 409 U.S. 188 (1972), the Court considered a habeas corpus challenge to a state con-

[5] We have adopted the *Simmons* independent basis rationale both when the flaw in the prior identification lies in the failure to have provided an opportunity for counsel, see, *e.g.*, *Holland* v. *Perini*, 512 F.2d 99, *cert. denied*, 423 U.S. 934 (1975); *Marshall* v. *Rose*, 499 F.2d. 1163 (1974); and when the flaw was arguably impermissible suggestiveness, see, *e.g.*, *United States* v. *Russell*, 532 F.2d 1063 (1976); *United States* v. *Scott*, 518 F.2d 261 (1975); *United States* v. *Matlock*, 491 F.2d 504, *cert. denied*, 419 U.S. 864 (1974); *United States* v. *Clark*, 499 F.2d 889 (1974), *cert. denied*, 420 U.S. 910 (1975); *Mock* v. *Rose*, 472 F.2d 619 (1972), *cert. denied*, 411 U.S. 971 (1973); *United States* v. *DeBose*, 433 F.2d 916 (1970), *cert. denied*, 401 U.S. 920 (1971).

viction which occurred before the *Wade* and *Stovall* decisions. It was based in part on evidence introduced at trial of a station-house identification by the victim. The Court stressed that in such cases the "primary evil" to be avoided was the "substantial liklihood" of misidentification. 409 U.S. at 198. The Court indicated that the evidence of that out-of-court identification need not have been excluded simply because "the police did not exhaust all possibilities in seeking persons physically comparable" to the defendant. It expressly refused to apply in that case "a strict rule barring evidence of unnecessarily suggestive confrontations" because the purpose of such a rule, "to deter police from using a less reliable procedure where a more reliable one may be available" could not be served by its application in a case in which "both the confrontation and the trial preceded Stovall . . . when [the Court] first gave notice that the suggestiveness of confrontation procedures was anything other than a matter to be argued to the jury." 409 U.S. at 199.

There has been considerable debate whether *Biggers* should be read as rejecting a strict rule that would emphasize control of police behavior in favor of a rule, to be applied not only in pre-*Stovall* but also in post-*Stovall* cases, that would require an examination of each case limited to the possibility of misidentification. The Second Circuit, in *Brathwaite* v. *Manson*, 527 F.2d 363, 371 (1975) (Friendly, J.) *cert. granted*, . . . U.S. . . . (1976), indicated that it views *Biggers* as only affecting pre-*Stovall* cases, and that a "stringent" rule excluding all "evidence of an identification unnecessarily obtained by impermissibly suggestive means" is necessary to "give fair assurance against

the awful risks of misidentification."[5a] The Seventh Circuit, however, in *United States ex rel. Kirby* v. *Sturges*, 510 F.2d 397 (7th Cir.), *cert. denied*, 421 U.S. 1016 (1975), refused to adopt such a rule and questioned the power of the federal courts to impose on the states rules whose "entire impact" would be to deter undesirable police conduct.[6]

This court has not been asked to commit itself to such a strict rule. We observe, however, that even in cases in which we focused on the question of the reliability of the identification, we also examined the practical alternatives available to the police at the time they chose to conduct the identification procedure, see *e.g.*, *United States* v. *Clark*, 499 F.2d 889 (1974), *cert. denied*, 420 U.S. 910 (1975); *United States* v. *Matlock*, 491 F.2d 504, *cert. denied*, 419 U.S. 864 (1974); *Mock* v. *Rose*, 472 F.2d 619 (1972), *cert.*

[5a] A "strict" rule would, in effect, make the degree to which an identification was *unnecessarily* suggestive a controlling, rather than an additional, factor in determining whether there was a denial of due process. Such a rule would reduce the number of cases in which there is a possibility of mistaken identification testimony by deterring police from using unnecessarily suggestive procedures. Testimony of possibly mistaken identification, unlike evidence that is excluded only because it was obtained in violation of Fourth Amendment rights, is inherently unreliable. Cf. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 258 (1973) (Powell, J., concurring); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 160 (1970).

[6] Panels in the Fourth Circuit, the only other circuit which has specifically addressed this question, have not agreed about the desirability of such a rule, or about the effect of *Biggers*. *Compare Smith* v. *Coiner*, 473 F.2d 877, *cert. denied*, 414 U.S. 1115 (1973), with *United States ex rel. Pierce* v. *Cannon*, 508 F.2d 197 (1974).

denied, 411 U.S. 971 (1973); and the degree to which the confrontation could be considered inevitable or accidental, see, *e.g.*, *United States* v. *Scott*, 518 F.2d 261 (1975).

Our decision in this case, however, does not require us to adopt such a rule.[7] The state does not argue that the station-house show up was not unnecessarily suggestive. Instead it argues that we should limit our consideration to determining whether the station-house identification of Webb was reliable. Respondent con-

[7] The district court, in denying appellant's petition for a writ of habeas corpus, relied on the factual similarities between this case and *Kirby* v. *Illinois*, 406 U.S. 682 (1972). The Supreme Court opinion in that case held that a person subjected to a one-man stationhouse show up conducted before formal charges had been filed was not entitled to counsel under the doctrine established in *Wade*, *supra*. Although there are similarities between *Kirby* and this case, there are important differences. Kirby was not brought to the station to be identified, and the situation resulting in the confrontation may not have been planned. In this case, although appellant was arrested on other charges, it appears that his arrest was precipitated by the suspicion that he was involved in the robbery. Baker and Leach were told to wait while he was brought in. There is testimony that some of the officers debated whether to subject appellant to the show up or whether instead to arrange a lineup, and that Webb himself requested one. There was nothing fortuitous about the arrest or the confrontation questioned here.

But more importantly, in *Kirby*, the Supreme Court limited its consideration to the question of the Sixth Amendment rights of the defendant. It expressly refused to consider whether the show up, and later admission into evidence of the resulting identification, deprived Kirby of the due process of law. 406 U.S. at 690 n. 8. This question was considered in a later habeas corpus action in which the Seventh Circuit denied relief. See *United States ex rel. Kirby* v. *Sturges*, *supra*.

tends that even if this evidence was obtained by impermissibly suggestive means, it was in fact reliable. We do not agree.

As we observed in *United States* v. *Russell*, 532 F.2d 1063, 1067 (1976), the Court in *Biggers*, *supra*, outlined the factors to be considered in determining the probability of misidentification when the identification procedure has been unnecessarily suggestive:

(1) the opportunity of the witness to view the criminal at the time of the crime
(2) the witness' degree of attention
(3) the accuracy of the witness' prior description of the criminal
(4) the level of certainty demonstrated by the witness at the confrontation
and
(5) the length of time between the crime and the confrontation.

Taking all these factors into account, we hold that the probability of misidentification during the station-house confrontation is great.

We have in the past noted that there is a great potential for misidentification when a witness identifies a stranger based solely upon a single brief observation. This is especially true when the observations were made at a time of great stress and excitement, see *United States* v. *Russell*, *supra*, and when the stranger is of a different race. The witnesses in this case, by their own testimony, could not have viewed the robbers for more than "a couple of minutes." For much of that time the witnesses were on the floor, and for all but a few seconds were at gunpoint. Although Baker testified that, after having advised his employees to

do so, he took special care in observing the robbers in order to be able to identify them, he was not able to describe them in any detail. If, as was assumed at trial, the shorter man with a squint in his left eye was not appellant, then apparently it was the state's theory that appellant must have been the other robber. The only information given about the second robber is that he was approximately six feet tall, weighed over 200 pounds, and had long sideburns. Although appellant is of this approximate height and weight, by the uncontroverted testimony, at the time of his arrest on the day after the robbery, he had a mustache and not long sideburns.

There are also several other unexplained discrepancies in the testimony given by the witnesses. First, at the suppression hearing, Leach testified that he had identified only one suspect, Lenzy, at the station on the morning after the robbery. The next day at trial, however, he testified that he had identified both Lenzy and appellant. Second, although Leach testified that he and Baker were first shown Lenzy, and then later shown appellant, Baker testified that he identified Lenzy only after he had identified Webb. Third, Baker testified that it was Lenzy who had held the gun to his face while Webb pushed Leach to the floor and kicked him. But Leach testified that it was Lenzy who had kicked him.

Although the role of the federal courts considering petitions for habeas is not to resolve conflicts in the evidence presented at trial, in this case the identification testimony was the only evidence connecting Webb with the armed robbery. This identification was made under circumstances so suggestive that its reliability is seriously impaired even without discrep-

ancies. By asking the witnesses to wait at the station while the officers left to bring in another suspect, the police unavoidably suggested to the witnesses that Webb, the man with whom the officers returned, was the man whom they should identify. There was no necessitous circumstance here, as there was in *Stovall*, that justified a hurried confrontation. No explanation was offered why a lineup was not arranged, and why the witnesses were not separated at the time each made his identification. We conclude, therefore, that, because the station-house identification was unreliable and because it was unnecessarily so, its admission at trial denied Webb the due process of law. See *Foster* v. *California*, 394 U.S. 440 (1968); *United States* v. *Russell*, *supra*; *Workman* v. *Cardwell*, 471 F.2d 909 (6th Cir.), *cert. denied*, 412 U.S. 932 (1972).

The testimony does not reveal that an independent basis existed for the in-court identification made after the constitutionally inadmissible evidence of the station-house confrontation had been introduced. Accordingly, we cannot dismiss the error as harmless. *Chapman* v. *California*, 386 U.S. 18 (1967).

The decision of the district court is reversed and the case is remanded with instructions to grant the writ of habeas corpus unless within a reasonable time petitioner is retried without the use of unconstitutionally obtained evidence.

ENGEL, Circuit Judge, concurring.

The observations of Judge Celebrezze in his dissent have considerable persuasive force when the facts here are compared with those which yielded a different result in *Hastings* v. *Cardwell*, *Holland* v. *Perini*, and *Heltzel* v. *Collins*, cited in the dissent. On the other hand, the factual context of *United States* v. *Russell*,

supra, tends by comparison to support the result which we reach in the instant case. As we continue to measure an ever growing variety of factual circumstances against the basic principles of *Stovall* v. *Denno* and subsequent decisions, we will run into the dilemma which Dean Griswold discussed in the 1974 Roscoe Pound Lectures with respect to search and seizure cases:

> In dealing with search and seizure cases, the Court is in fact confronted with a massive dilemma. On the one hand, the cases are fundamental and of great public importance. In some ways they go to the heart of our system of justice, and it is comforting to think that the Supreme Court is ultimately available to deal with questions of this sort. But, on the other hand, the number of cases is great, and is increasing. And each of these cases is a world in itself. Any case in the search and seizure area will be different from every other case. There is only limited precedential value in the decisions, and experience shows that language used in one case in the search and seizure field often has to be qualified or explained away when a different case arises with slightly different facts. The result is an inherent amount of uncertainty, and this uncertainty extends to the lower courts, which have to try to apply the decisions of the Supreme Court.

Erwin N. Griswold: "Search & Seizure — A Dilemma of the Supreme Court", delivered at the University of Nebraska College of Law; March 18-19, 1974.

My primary reason for concurrence is that an examination of the record in the state court shows that the one-on-one identification of appellant was totally suggestive. Webb was under arrest. The witnesses were in effect told whom they were to expect and were then shown the suspect. It is difficult to find a more suggestive procedure than that employed in this case. There is also no credible finding by the state trial court, which I might otherwise be obliged to honor, that the identification by the witnesses had an independent and untainted basis.

Accordingly, I concur in Judge McCree's decision. At the same time, because we need not rely on it here, I would refrain from any expression of preference for the "strict" rule over the approach expressed by the Seventh Circuit in *United States ex rel Kirby* v. *Sturges*, 510 F.2d 397 (7th Cir. 1975).

CELEBREZZE, Circuit Judge, dissenting.

I respectfully dissent. I cannot reconcile the majority view with our prior decisions which have sustained the constitutionality of post-*Stovall*, one-on-one identifications procured under circumstances no more inherently suggestive than those of the showup employed here. *Hastings* v. *Caldwell*, 480 F.2d 1202, 1203 (6th Cir. 1973); *Holland* v. *Perini*, 512 F.2d 99, 103-104 (6th Cir. 1975); *Heltzel* v. *Cowan*, 518 F.2d 851, 852-853 (6th Cir. 1975). In each of these cases we tacitly declined to impose upon the states a per se rule which would exclude evidence of any suggestive, out-of-court identification not justified by exigent circumstances.

Although the majority appears to favor a strict exclusionary rule turning upon the extent to which resort to impermissible identification procedures was compelled by necessity, it honors these precedents by continuing to adhere to the standard of review suggested in *Neil* v. *Biggers*, 409 U.S. 188 (1972). However, in applying *Biggers*' five criteria to "the totality of the circumstances" of the instant case, I disagree with the conclusion reached by the majority. The identifications were not so tainted by the apparent suggestiveness of

the custodial environment or the statements made by the police as to invoke a palpable likelihood of misidentification. Independent indicia of reliability present here are no less persuasive than they were in the prior cases where we found no denial of due process.

The majority fails to expose any clear error in the factual finding made by the District Court that "there is nothing to indicate that either witness was subjected to or responded to official suggestions in the pretrial identification." In the absence of that, I see no basis for our substitution of judgment. I would therefore affirm the denial of the writ of habeas corpus.

No. 75-2374

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed March 25, 1977

WALTER WEBB, JR.,
Petitioner-Appellant,

v.

JOSEPH H. HAVENER,
Respondent-Appellee.

ORDER

Before: CELEBREZZE, McCREE and ENGEL, Circuit Judges.

Appellee filed a petition for rehearing with a request for rehearing en banc. No Judge of this Court having moved for a rehearing en banc, the petition to rehear has been referred to the hearing panel.

Upon consideration, the Court being advised, it is ORDERED that the petition for rehearing be DENIED.

ENTERED BY ORDER OF THE COURT
JOHN P. HEHMAN, *Clerk*